

Serial No. 10/812,160

Amendment dated September 20, 2004

Amendment under 37 CFR §1.111 in Response to Office Action dated June 24, 2004

REMARKS/ARGUMENTS

Applicant respectfully requests reconsideration and withdrawal of the rejections set forth in the above-identified Office Action.

Enclosed with this Amendment is a Terminal Disclaimer with respect to U.S. Patent 6,726,968 (which issued from the parent application of the present application).

By this Amendment, new claims 43-48 have been added to recite certain specific features of this invention. Claim 43 recites that the protective film is a polyvinylidene chloride, and claim 44 recites that the protective film is a polyurethane. Both of these materials are recited as elements of the Markush group appearing in independent claim 42. Claim 45 recites that the nylon is nylon 6; support for this feature appears throughout the specification, such as at page 7, lines 15-16, for example. Claims 47 and 48 are similar to claims 43 and 44.

It is respectfully submitted that claims 38-48 are patentable and should be allowed.

The thoroughness of Examiner Nordmeyer's review of the application is appreciated. It is believed that in view of the following remarks, the rejection of all of the claims should be withdrawn and all pending claims should be allowed.

This invention relates to a food package which includes a container having an open portion and a multilayered film sealing the open portion. The multilayered film is an antifog/barrier laminate useful in meat packaging, in particular packaging in a controlled atmosphere environment. The film itself is claimed in the parent application (now USP 6,726,968). The problem with the prior art films used in this type of structure was that in multilayered films which included an antifog composition that was blended into or coated onto a sealant film, the antifog component tended to be drawn toward polar materials (such as nylon) and away from non-polar materials, such as polyethylene that is typically used for the sealant layer. This is a particular

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problem when the film is rolled up after manufacture, because the antifog-containing layer is brought into direct contact with the adjacent nylon layer. This causes the antifog component to migrate out of its existing layer and into the nylon layer, which compromises the performance of the nylon layer as well as degrades the antifog property of the film.

Applicant's patented multilayered film includes a protective film on the surface of the nylon film which is opposite to the antifog-containing film. This results in the antifog-containing film of one layer in the roll from being in direct contact with the nylon film of an adjacent layer of the roll. As a result, migration of the antifog component is prevented. In the present application, there is claimed a food package and a packaged food which incorporates such multilayered film. In particular, the package is covered with a film that includes layers of a sealant film that contains (or is coated with) an antifog composition, a nylon film and a protective film that faces away from the open portion of the container.

The claimed food package or packaged food includes a protective film which is selected from the group consisting of polyvinylidene chloride, polyurethanes, amine modified polyurethanes, epoxies, polyesters, acrylics, polyols and combinations thereof. The packaged food of claim 42 and its dependent claims calls for a nylon/ethylene vinyl alcohol/nylon multilayer structure, with a polyethylene sealant film positioned over a surface of the second nylon film and the protective film applied to a second surface of the first nylon film. It is respectfully submitted that the claimed food package and packaged food are not taught or suggested in the prior art.

The various rejections set forth in the Office Action will now be addressed.

I. The Rejection of the Claims on the Ground of Double Patenting over
Hatley et al.

In the Office Action, it was stated that claims 1-8, 14-28, 30, 31 and 38-41 were rejected on the ground of double patenting over claims 1-20 of commonly

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assigned U.S. Patent 6,447,892 to Hatley et al. Clearly, the statement regarding claims 1-8, 14-28, 30 and 31 is erroneous since such claims were cancelled upon filing of this application. It is believed that this is a typographical error in the Office Action.

As to the rejection of claims 38-41, it is submitted that Hatley et al. do not teach a protective layer as claimed herein in a food package or packaged food.

It was stated that Hatley et al. disclose a multilayered film with sealant and protective layers attached to it for use in packaging meat items. It is respectfully pointed out that Hatley et al. do not disclose a protective film as claimed herein, wherein the protective film faces away from the open portion of a container and wherein the protective film is selected from the group consisting of polyvinylidene chloride, polyurethanes, amine modified polyurethanes, epoxies, polyesters, acrylics, polyols and combinations thereof.

As such, it is respectfully submitted that there is no double patenting over claims 1-20 of Hatley et al. and that this ground of rejection should be withdrawn.

II. The Rejection of the Claims on the Ground of Double Patenting over Porter

Paragraph 2 of the Office Action states that claims "38-32" were rejected on the grounds of double patenting over U.S. Patent 6,726,968 to Porter. It is believed that there is a typographical error in the Office Action in that claim 42 was intended rather than claim 32 (since claim 32 was previously cancelled).

The Porter patent is the parent to the subject application. In order to obviate this rejection, enclosed herewith is a Terminal Disclaimer which disclaims the terminal portion that may extend beyond the term of the Porter patent. With the entry of the Terminal Disclaimer, it is respectfully submitted that this ground of rejection

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would no longer apply. Accordingly, entry of the Terminal Disclaimer and withdrawal of this ground of rejection is submitted to be in order.

III. The Rejection of the Claims on the Ground of Obviousness-Type Double Patenting over Hatley et al. in view of Bauer et al.

Claims 38-42 were rejected in the Office Action on the ground of obviousness-type double patenting as being unpatentable over claims 1-20 of U.S. Patent 6,447,892 to Hatley et al. in view of U.S. Patent 5,837,358 to Bauer et al. Reconsideration and withdrawal of this ground of rejection are respectfully requested.

It was stated that Hatley et al. discloses a "protective film of polyvinylidene chloride (Column 8, lines 20-24) ...". However, at that location, Hatley et al. merely disclose that polyvinylidene chloride is one of many suitable oxygen barrier films; no mention is made at all of a "protective" film in this reference. The oxygen barrier films of the Hatley et al. structure are sandwiched between two shrinkable films, one of which is adjacent a sealable film which includes an antifog composition. Thus, it is submitted that Hatley et al. do not disclose a protective film as claimed herein wherein the protective film faces away from the open portion of the container.

It was also stated in the rejection that a protective film of ... "or polyurethane (Column 5, line 35) is attached through coating (Column 4, lines 27-29)". In fact, at column 5, line 35, there is made reference to copolymers of olefins with other polymers, among them being polyurethane. Thus, any polyurethane in the structure of Hatley et al. would be included in the sealant layer and would not be in a separate protective layer. Likewise, Hatley et al. nowhere refers to the polyurethane as being a protective film. The citation to column 4, lines 27-29 refers to the manufacture of the films of Hatley et al. by convention techniques, and it is noted that "coating" is not mentioned. Moreover, there is nothing in Hatley et al. that suggests that either the polyvinylidene chloride or the polyurethane is employed to enhance the oxygen characteristics of the multilayered film, as stated in the rejection.

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Therefore, Applicant respectfully submits that Hatley et al. simply does not teach or suggest the present invention. Therefore, it is clear that the double patenting rejection based on Hatley et al. is unfounded as there would be no improper extension of the right to exclude granted in the prior patent. It is noted that although the statement of the ground of rejection in Paragraph 4 of the Office Action refers to Bauer et al., there is no specific mention of any disclosure of this patent. As addressed *infra*, it is clear that Bauer et al. also neither teach nor suggest the claimed invention. Accordingly, it is submitted that any proposed modification of Hatley et al. by Bauer et al. would not result in Applicant's claimed invention and consequently withdrawal of this ground of rejection is also respectfully requested.

IV. The Rejection of the Claims under 35 USC 102 (e) as Anticipated by Hatley et al.

It was stated in Paragraph 6 of the Office Action that claims 38-42 were rejected under 35 USC 102 (e) as anticipated by Hatley et al. U.S. Patent 6,447,892. This ground of rejection is also respectfully traversed.

Paragraph 6 of the Office Action repeats the same reasoning regarding the disclosure of Hatley et al. as is stated in Paragraph 4 of the Office Action concerning the double patenting rejection over Hatley et al. in view of Bauer et al. Applicant repeats herein the comments made in Section III above regarding the failure of Hatley et al. to disclose the invention claimed herein. For the same reasons it is respectfully submitted that Hatley et al. do not anticipate claims 38-42 or new claims 43-48. Therefore withdrawal of this ground of rejection is likewise submitted to be in order.

V. The Rejection of the Claims under 35 USC 103 (a) as being Unpatentable over Bauer et al.

In Paragraph 8 of the Office Action claims 38-42 were rejected under 35 USC 103 (a) as unpatentable over Bauer et al., U.S. Patent 5,837,358. Applicant respectfully traverses this ground of rejection also.

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Although Bauer et al. discloses a multilayer film structure, that structure is very different from that claimed herein (or that of Hatley et al.). The polyurethane is one of many materials that can form a tie layer. There is no protective layer on the outside of a structure which would face away from the open portion of the container. Moreover, there is no disclosure in Bauer et al. of an antifog composition and the reference is totally unconcerned with antifog-containing structures.

It was stated in the Office Action that Bauer et al. fail to disclose a food package made with a container having an open portion and the multilayer film sealing the open portion. It was held that it would be obvious to provide a container with an open portion covered with a multilayer film to store meat since the film of Bauer et al. is used to wrap a meat product to keep it fresh. Applicant firstly submits that there is nothing in Bauer et al. (or elsewhere) to even remotely suggest that their film be used as a covering for a container that contains a meat product. The mere fact that the film of Bauer et al. can be used for wrapping meat would not lead one skilled in the art to seal a container with such film, absent the improper use of Applicant's own disclosure. Secondly, even if the conclusion that it would be obvious to use the film of Bauer et al. in such manner were correct (which Applicant disputes), it is respectfully submitted that the presently claimed invention would still not be shown since the multilayer film of Bauer et al. does not have an antifog composition coated onto or contained within a sealant film, such as a polyethylene film. Therefore, it is respectfully submitted that the obviousness rejection of the claims over Bauer et al. is not proper and that the claims define over Bauer et al. in a patentable manner. Accordingly, withdrawal of this ground of rejection is also submitted to be in order.

VI. Summary

In view of the above remarks, Applicant respectfully submits that each ground of rejection of claims 38-42 set forth in the Office Action should be reconsidered and

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withdrawn. Applicant also respectfully submits that new dependent claims 43-48 are also patentable, as they define further features of the invention. Therefore, Applicant most respectfully requests reconsideration of all of the grounds of rejection and allowance of claims 38-48. An early notification to that effect and allowance of the application are respectfully requested.

Should the Examiner believe that a discussion with Applicant's attorney would in any way advance the prosecution of this application, she is respectfully requested to telephone the undersigned.

Respectfully submitted,
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Enclosure - Terminal Disclaimer